

January 7, 2011

Marlene Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

**Re: MM Docket No. 99-25**

The Prometheus Radio Project (“Prometheus”) respectfully submits the following *ex parte* presentation to address the impact of the recently enacted Local Community Radio Act, HR 6533 (the “LCRA”), on the petitions for reconsideration in this docket.

**Summary**

- I. The Petitioners’ argument that the Commission may not revise its procedures for processing pending applications is without merit. However, any procedure for processing Auction 83 applications must fulfill the requirement of the LCRA, which requires the FCC to ensure LPFM availability and create a balance of LPFMs and translators “based on the needs of local communities.”
- II. On the other hand, the Petitioners’ argument that the ten application cap does not demonstrably benefit LPFM may have merit. New simulations demonstrate that implementation of the “ten cap” as proposed by the Commission likely will have a preclusive impact on LPFM spectrum availability in urban areas. This solution therefore does not meet the requirements of the LCRA.
- III. Unlike the current version of the ten cap, implementation of the Prometheus/EMF proposal would comply with the mandates of the LCRA.
- IV. Reconsideration of the Auction 83 processing cap is a separate issue from the pending issues in FNPRM.
- V. The Ace Radio petition is superceded by the legislation, which authorizes second-adjacent waivers and does not dictate the Commission’s interpretation of secondary status.

**Introduction**

Four petitions sought reconsideration of the *Third Report and Order*’s<sup>1</sup> ten-application limit (henceforth the “ten cap”) for further processing of Auction 83 FM translator applications. The Media Bureau ceased implementation of this processing cap in order to provide an opportunity for the Commission to fully consider the arguments raised in the petitions for reconsideration. The recently passed Local Community Radio Act provides some new direction to the Commission for resolving the arguments raised by the petitions.

- I. The Petitioners’ argument that the Commission may not set processing limits is without merit. However, any Commission policy on Auction 83 must fulfill the requirements of the LCRA, which requires the FCC to ensure LPFM availability and create a balance of LPFMs and translators “based on the needs of local communities.”**

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<sup>1</sup> *Creation of A Low Power FM Radio Service*, MM Docket No. 99-25, Third Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 21912, ¶ 56 (2007) (“*Third Report and Order*”).

As Prometheus has previously argued, the Petitioners' challenge to the FCC's authority to create a processing cap is without merit, because "the Commission's action is more than justified by its legal authority to adopt processing guidelines."<sup>2</sup> As Prometheus explained there, "[i]t has long been recognized that the Commission has the 'authority to change license allocation procedures midstream.'"<sup>3</sup> The Commission "is entitled to reconsider and revise its views as to the public interest and the means needed to protect that."<sup>4</sup> In *Bachow Communications Inc. v. FCC*, the DC Circuit Court upheld the Commission's authority to apply new or modified rules to pending applications "even though it disrupts expectations and alters the competitive balance among applicants."<sup>5</sup> Thus, the Commission may revise the processing guidelines in Auction No. 83's filing window based on a determination as to whether the guideline will serve the public interest.<sup>6</sup>

Although the Commission has clear authority to revise processing guidelines for Auction 83, any such revision must comply with the LCRA. Section 5 of that Act directs the Commission to ensure spectrum availability for LPFM. Specifically, this section requires the Commission to make decisions balancing the licenses for FM translators, FM booster stations, and LPFM stations "based on the needs of the local community." Section 5 therefore has implications for the disposition of the Auction 83 FM translator applications, and any action taken on this matter must fulfill the directives of this new law.

To implement the LCRA's requirement that opportunities for licenses in these radio services must be balanced, with licensing decisions based on local communities' needs, the Commission must consider the localism benefits of each service. LPFM was designed as "a program service responsive to the needs and interests of small local community groups, particularly specialized community needs that have not been well served by commercial broadcast stations."<sup>7</sup> As envisioned by the Commission, this service was created to expand diversity and localism on the airwaves, serving the diverse communities currently unserved by existing broadcast services. Such unserved and underserved communities exist everywhere, including in urban areas.

Translators also can and must meet local community needs. In an amendment to the FM translator rules, the Commission clarified "the intended purpose of this service, which is to provide supplementary service to areas in which direct reception of radio broadcast stations is unsatisfactory due to distance or intervening terrain barriers."<sup>8</sup> The Commission went on to emphasize initially that this supplementary service is "the sole purpose of FM translators."<sup>9</sup> Translators provide excellent coverage for rural or terrain-obstructed areas that cannot otherwise receive radio service, but they have little or no purpose in unobstructed but densely populated urban areas, where spectrum availability is especially scarce. Prometheus submits, therefore, that no city has a greater community need for an existing station to be repeated on ten translators than it does for local community radio service. In other words, the ability of a single company to rebroadcast the same programming throughout a given urban area is not the "need" translators are designed to meet.

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2 See Opposition to Request for Stay of Prometheus Radio Project, MM Docket No. 99-25, at ii (filed March 20, 2008).

3 See *id.* (quoting *Bachow Communications, Inc. v. FCC*, 237 F.3d 683, 686 (D.C. Cir. 2001)). The *Bachow* decision itself cites *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987) and *DirectTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

4 *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411 (D.C. Cir. 1983).

5 *Bachow Communications, Inc.*, 237 F.3d at 687-88.

6 See *Washington Association for Television and Children v. FCC*, 665 F.2d 1264, 1268 (D.C. Cir. 1981).

7 *Creation of Low Power Radio Service*, MM Docket No. 99-25, Report and Order, 15 FCC Rcd 2205, ¶ 17 (2000).

8 See *Amendment of the Commission's Rules Concerning FM Translator Stations*, 5 FCC Rcd 7212, ¶ 1 (1990).

9 *Id.* ¶ 5.

In recent months, community groups in San Francisco, Chicago, Portland, and Los Angeles have filed letters in this docket explaining how they seek to address local community needs with LPFM stations. All of these groups are concerned with the impact of the Auction 83 applications on LPFM availability in their cities and are located in a city studied in the most recent Common Frequency filing, which examines all frequencies available in these cities (not just those applied for in Auction 83).<sup>10</sup> The results of Common Frequency's projections and analyses are troubling for the potential prospects of LPFM applicants. In each case, granting the remaining FM translator applications even after the imposition of the ten cap likely would exacerbate the imbalance in the availability of spectrum for LPFM and FM translator services. In the cities that Common Frequency modeled in depth, local groups have already demonstrated local need to the Commission, documenting that need in several filings in this docket. If most of the remaining available channels in these urban areas and other large markets are taken by translators, the Commission will have failed to address the local needs that the LCRA requires it to take into account.

The FCC must find a way forward with Auction 83 that accounts not primarily for the rights and needs of the petitioners for reconsideration and FM translator applicants, but for the rights and needs of local communities. Under Section 307(b) of the Communications Act, the FCC has an obligation to balance radio services in the public interest.<sup>11</sup> Now under the LCRA as well, the FCC is required to balance opportunities for these services, and to do so based on the needs of local communities.

**II. The Petitioners' argument that the ten cap does not demonstrably benefit LPFM does indeed appear to have merit. New simulations demonstrate that the ten cap will likely have a preclusive effect on LPFM availability in almost all densely populated urban areas. This solution therefore does not meet the requirements of the LCRA.**

The Commission recognized in *Third Report and Order* the preclusive impact of Auction 83 application processing on LPFM service, finding it "apparent that the translator filings have precluded or diminished LPFM filing opportunities in many communities."<sup>12</sup> This preclusionary impact was the central justification for the implementation of the ten cap: "In order to further our twin goals of increasing the number of LPFM stations and promoting localism, we find it necessary to take action. Accordingly, we will limit further processing of applications submitted during the Auction No. 83 filing window to ten proposals per applicant."<sup>13</sup>

The Commission's action was well-reasoned and well within the bounds of Commission authority, and the public interest benefits of limiting this preclusive impact on LPFM service remain. Nevertheless, it has become apparent to Prometheus that the current version of the ten cap does not demonstrably achieve the Commission's goal of preserving LPFM availability. The petitions for reconsideration make this assertion, and on this specific point, information derived from new studies shows that the petitions' arguments are persuasive. Contrary to NPR's claim that "none of the petitioners challenged the *Third Report and Order* on the grounds that it did not go far enough in preserving spectrum for LPFM use,"<sup>14</sup>

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<sup>10</sup> Common Frequency *Ex Parte* Presentation, MM Docket No. 99-25 (filed Nov. 12, 2010).

<sup>11</sup> 47 U.S.C. § 307(b) ("[T]he Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.").

<sup>12</sup> *Third Report and Order* ¶ 53.

<sup>13</sup> *Id.* ¶ 56.

<sup>14</sup> *Ex Parte* Letter from Gregory A. Lewis, National Public Radio, to Marlene H. Dortch, Secretary, Federal Communications Commission, MM Docket No. 99-25, at 2 (filed Oct. 15, 2010).

petitioners pointed to the ten cap's "uncertain benefit" to LPFM to argue that the plan did not satisfy certain legal requirements.<sup>15</sup>

This uncertain benefit to LPFM availability supposed in the petitions for reconsideration has been analyzed further in two recent filings by the organization Common Frequency. Simulating the results of implementing the ten cap as adopted by the Commission, these studies show that the ten cap very likely would fail to provide a reasonable balance of LPFM and translator stations, giving most available frequencies in most cities to translator applicants.<sup>16</sup>

Therefore, the stated purposed of the ten cap to further the Commission's "twin goals of increasing the number of LPFM stations and promoting localism,"<sup>17</sup> will not be achieved under the current policy. Neither will the aspirations of the thousands of community groups in mid-size to large cities who have waited for more than ten years for this opportunity. Thus, if the Commission proceeds with a policy that does not demonstrably preserve channels for LPFM in urban areas, this will not comply with the statutory directive in the LCRA to ensure spectrum availability for new LPFM stations.

The ten cap was designed to address mass filings by a handful of applicants who put in thousands of applications for channels across the country. However, the problem in Auction 83 did not end there. The LCRA requires the Commission to address speculative behavior, not only to curb such practices but also to preserve availability of spectrum in all local radio markets – so that a reasonable number of channels remain for local community radio stations, despite the problems arising from the initial approaches to Auction 83.

### **III. Unlike the current version of the ten cap, the Prometheus/EMF proposal would comply with the law by ensuring that local community needs are met.**

As the Commission has stated, it is difficult to predict demand for LPFM stations: "the interest of local organizations to apply for, construct, and operate new LPFM stations can only be determined at the time a window is opened."<sup>18</sup> We therefore believe that the best way to ensure that the needs of local communities are met is for the Commission to open an LPFM licensing window prior to addressing the Auction 83 applications. Demand for LPFM in a local community can be accurately determined when local groups have an opportunity to apply. Where there is not sufficient interest locally to support an LPFM station, translators can fulfill their intended purpose to extend coverage to areas that would otherwise not have access to FM radio service.

Whatever the Commission's ultimate decision on the sequence of filing windows, the fact remains that the ten cap solution – for which Prometheus itself did not initially seek reconsideration – would not comply with the spectrum availability and localism mandates of the LCRA. Prometheus currently has a proposal before the Commission, jointly filed with EMF, that suggests potential alternative solutions better-suited to address the preclusive impact of ten cap implementation.<sup>19</sup>

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15 See, e.g., Petition for Reconsideration of Educational Media Foundation *et al.*, MM Docket No. 99-25, at 10 (filed Feb. 18, 2008) ("[T]his deprivation outweighs the uncertain benefit that [the Commission] hopes to realize from capping FM translator proposals at ten per applicant, as the Commission has no idea how many, if any, LPFM applications will be permitted by this action.").

16 See, e.g., Common Frequency Study cited above in note 10; see also Common Frequency *Ex Parte* Presentation, MM Docket No. 99-25 (filed Sept. 28, 2010).

17 *Third Report and Order* ¶ 56.

18 *Id.* ¶ 52.

19 See Educational Media Foundation and Prometheus Radio Project Memorandum of Agreement Regarding LPFM/FM Translator Priorities, MM Docket No. 99-25 (filed Sept. 22, 2010).

We believe that this proposal is a good solution to balancing the interests of the two services. However, Prometheus remains open to any solution that demonstrably preserves meaningful LPFM availability in urban areas. Any such solution would need to comply with the LCRA's mandate to base decisions on the needs of local communities, and must permit the Commission to ensure the efficient and balanced use of spectrum both by LPFM and FM translator stations.

**IV. Reconsideration of the Auction 83 processing cap is an issue separate from the pending issues in the Second Further Notice of Proposed Rulemaking, and can be resolved prior to a resolution of the priority between LPFMs and translators.**

For these reasons, we believe that the LCRA statutorily prohibits the Commission from disposing of the Auction 83 translator applications in a manner that fails to address local demand for LPFM. Conversely, we do not believe that this legislation prohibits the Commission from taking *some* action or making modifications on reconsideration of the *Third Report and Order* to ensure LPFM availability. The Commission has not reached a conclusion on the meaning of co-equal status between LPFM and translator stations,<sup>20</sup> a status now confirmed by Section 5 of the LCRA. However the Commission ultimately interprets this provision and implements the statute when processing LPFM and translator applications, the LCRA does not permit the Commission to take steps that would preclude LPFM applicants from meaningful spectrum availability.

**V. The Ace Radio challenge to the interim waiver policy has been superceded by the LCRA, but that statute does not dictate the Commission's interpretation of the term "secondary."**

The fifth of the petitions for reconsideration in this docket, filed by Ace Radio Corporation, sought reconsideration of the Commission's interim waiver policy (the "Interim Policy") for Section 73.807 of the Commission's rules, along with reconsideration of related conclusions in the *Third Report and Order*. With enactment of the LCRA, waiver of the second-adjacent channel distance separation requirement rule for LPFM stations impacted by new or modified full-service FM facilities is authorized by the statute – Section 3 of which will govern the Commission's grant of any such waivers and the operations of LPFM stations that receive them.

The LCRA states that LPFM stations "remain...secondary to existing and modified full-service FM stations." Yet, the new law should be read to preserve the Commission's discretion within that statutory framework to adopt policies defining the rights and responsibilities of full power, translator, and LPFM stations. Thus, LPFM stations "remain...secondary" to full power stations, just as LPFMs were secondary to such stations under the rules adopted in the *Third Report and Order*. The Commission can, pursuant to LCRA Section 3, waive its second-adjacent channel distance separation requirements. It also can continue to afford procedural protections to these LPFM stations, even as LPFM operations remain secondary to full power station operations.

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20 See *Third Report and Order* ¶ 84.

## Conclusion

For the reasons briefly discussed above, Prometheus believes the Commission can and should modify the “ten cap” proposal as adopted in the *Third Report and Order*. It should do so either in the manner proposed in the EMF/Prometheus proposal, or via another alternative method that complies with the LCRA and limits the preclusive impact on LPFM that imposition of the ten cap likely would effect.

In our opinion, based upon initial analysis of the newly enacted LCRA, this law does not dictate any single result in the Commission’s rulings on the pending petitions for reconsideration. Yet, it does prohibit the Commission from taking any action that fails to preserve spectrum availability for LPFM stations and FM translator stations alike, and prohibits the Commission from making licensing decisions that are not “based on the needs of the local community.”

Respectfully submitted,

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